# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 25, 2014 |
| v | No. 313758<br>Wayne Circuit Court |
| MICHAEL VERN VILLNEFF,<br><br>Defendant-Appellant. | LC No. 12-006550-FH |

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals from his jury trial convictions for two counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a) and MCL 750.520e(1)(b). Defendant was sentenced to one to two years in prison for each conviction. Because defendant's trial counsel's failure to object to a police officer's testimony did not fall below an objective standard of reasonableness and because counsel's failure to exclude or decline to elicit evidence of defendant's prior convictions did not affect the outcome of the trial, we affirm.

Defendant first argues that his trial counsel was ineffective for failing to object to the testimony of a police officer that defendant claims constituted impermissible opinion-of-guilt testimony.[1]

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039, 80 L Ed 2d 657 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Swain*, 288 Mich App at 643. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell

[1] "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Id*.

Defendant takes issue with the following exchange between the police officer and the prosecutor:

> *Q.* And at some point, did you make a decision to arrest the defendant?
>
> *A.* Yes.
>
> *Q.* And at which point did you make that decision?
>
> *A.* After we talked to [a] witness . . . and the victim, we decided to make an arrest based on accusations made.

It is a well-established rule of law that a "witness may not opine about the defendant's guilt or innocence in criminal case." *People v Heft*, 299 Mich App 69, 81; 829 NW2d 266 (2012). In *Heft*, we examined a police officer's testimony that the defendant's explanation of his actions did not make sense because the defendant "was breathing hard, he was perspiring, and so that made me feel like something was afoot, something was not right." *Id*. We held that this testimony was not an improper opinion about the defendant's guilt. *Id*. at 83. Instead, the officer was merely "explaining the steps of their investigations from their personal perceptions." *Id*. The same principle applies here. The officer was not offering his opinion regarding whether defendant was guilty or innocent but rather explaining the steps of the investigation – that he made an arrest after speaking to a witness and the victim – in response to the prosecutor's questions. Because the officer's statements did not constituted impermissible opinion-of-guilt testimony, any objection by defense counsel would have been futile. Because "[d]efense counsel is not required to make meritless objections[,]" *Heft*, 299 Mich App at 83, defendant's counsel was not ineffective on this basis.

Defendant also argues that his trial counsel was ineffective for eliciting testimony from defendant on direct examination regarding his prior felony convictions. Specifically, he challenges the following exchange that occurred during direct examination:

> *Q.* Oh. I forgot to ask you, [defendant], do you have any prior felony convictions for anything involving theft or dishonesty, in the past ten years?
>
> *A.* Yes, I do.
>
> *Q.* What is that?
>
> *A.* I was convicted of armed robbery, felony firearm, and carrying a concealed weapon.
>
> *Q.* Okay. How long ago was that?
>
> *A.* That was in 2003, I believe, I was convicted. And I was charged in 2002.

*Q.* Okay. You're not on probation or parole?

*A.* No.

MRE 609(a) permits evidence of prior convictions for the purposes of impeachment when:

> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness if the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

We have held that "it may be sound trial strategy for a defendant to front a conviction that is likely to come to the jury's attention on cross-examination." *People v Rodgers*, 248 Mich App 702, 716; 645 NW2d 294 (2001); *Ohler v United States*, 529 US 753, 758; 120 S Ct 1851; 146 L Ed 2d 826 (2000). However, the claim here is that trial counsel brought out prior convictions that would not have otherwise been revealed to the jury. Neither felony-firearm, MCL 750.227b, nor carrying a concealed weapon, MCL 750.227, contains an element of dishonesty, false statement, or theft. MRE 609(a). Moreover, neither conviction has any probative value as to defendant's credibility or tendency to commit CSC IV. *Id*. Accordingly, the prosecutor would not have been entitled to introduce those two convictions on cross-examination and, thus, defendant's counsel's elicitation of those convictions fell below an objective standard of reasonableness. *Swain*, 288 Mich App at 643.

By contrast, armed robbery, MCL 750.529, contains an element of theft. MRE 609(a)(2). Due to counsel's failure to move for exclusion of defendant's armed robbery conviction, the trial court did not determine whether the conviction's probative value outweighed its prejudicial effect. MRE 609(a)(2)(B). A review of the record indicates that the trial court could have ruled that the armed robbery conviction's prejudicial effect outweighed its probative value, or vice versa, without abusing its discretion. Thus, defendant's trial counsel's elicitation of testimony regarding the armed robbery conviction, as well as his failure to move for its exclusion, fell below an objective standard of reasonableness. *Swain*, 288 Mich App at 643.

Nonetheless, we do not find a reasonable probability that, but for defendant's trial counsel's errors, the outcome of the trial would have been different. *Id*. There is ample evidence in the record to support the jury's verdicts independent of defendant's prior convictions. The victim testified, in detail, regarding the acts of CSC IV perpetrated by defendant. A witness testified that he saw defendant commit two of the three acts described by the victim. At least two other witnesses testified that the victim told them about defendant's actions soon after they occurred. Accordingly, because there was sufficient evidence to support the jury's verdicts outside of the erroneously elicited and admitted prior convictions, defendant's trial counsel's

errors did not affect the outcome of the trial and, therefore, defendant is not entitled to reversal. *Swain*, 288 Mich App at 643.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro